Certco Distribution Centers *and* Teamsters Local Union No.695, affiliated with the International Brotherhood of Teamsters.[1] Case 30–CA–16895–1

April 28, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 5, 2005, Administrative Law Judge George Carson II issued the attached decision. The General Counsel and the Charging Parties filed exceptions and briefs. The Respondent filed cross-exceptions and a supporting brief. The Charging Party filed a response brief and a reply brief. The General Counsel filed an answering brief and a reply brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.

I. BACKGROUND

In mid-February 2004,[3] the Respondent, a food and grocery distributor in Madison, Wisconsin, decided to open a new warehouse to service a large new client account. Until that time, the Respondent had one facility in Madison, on Verona Road (Verona). The Union has represented the Verona employees since 1962. In February, the Respondent announced the opening of a new facility in Madison, on Helgesen Drive (Helgesen). The Union contended that it should represent the Helgesen employees as an accretion to the Verona unit and that the parties' collective-bargaining agreement should apply at Helgesen. The Respondent announced, however, that the Helgesen facility would not have a bargaining unit, and it declined to recognize the Union or apply the contract at the new warehouse. The Respondent's managers also repeatedly suggested to Verona employees that they would be better off with the Company's 401(k) plan, which would apply at Helgesen, than with the Union's pension plan.

On February 27, the Union filed a grievance over the opening of the Helgesen facility. The Respondent rejected the grievance as nonarbitrable.

In March, the Helgesen facility opened. No Verona employees applied for positions at Helgesen, and none were hired. The Respondent later began to transfer large quantities of candy and health and beauty aid products from Verona to Helgesen.

On May 10, the Union requested information from the Respondent concerning both the Verona and the Helgesen facilities. The Respondent never answered the information request.

II. THE JUDGE'S DECISION

The judge recommended dismissal of the complaint allegations that the Respondent violated Section 8(a)(3) of the Act by failing to hire union members at Helgesen, and that it violated Section 8(a)(5) by refusing to recognize the Union and apply the contract at the new facility and by refusing to arbitrate the Union's grievance. We adopt those recommendations for the reasons set forth in the judge's decision.[4]

The judge found, and we agree, that the Respondent violated Section 8(a)(5) by failing and refusing to provide the Union with some of the information it had requested. Unlike the judge, however, we find that the Respondent was required to provide all of the requested information. We also reverse the judge's finding that the Respondent violated Section 8(a)(1) by telling its employees that the Helgesen facility would be nonunion.[5] Our reasons follow.

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All dates are in 2004, unless otherwise specified.

[4] In addition, we adopt the judge's finding that there was no allegation that the opening of the new facility and the transfer of work to that facility violated the Act.

In finding that the refusal to arbitrate was not unlawful, Member Liebman relies on Board precedent holding that the refusal to arbitrate a "narrow, specifically defined grievance subject matter" does not violate the Act. See *GAF Corp.*, 265 NLRB 1361, 1365 (1982).

[5] The judge found that the Respondent violated Sec. 8(a)(5) by engaging in direct dealing with Verona employees when it repeatedly touted the benefits of the Company's 401(k) plan over the union pension plan. We adopt the judge's finding, for the reasons stated in his decision. In so finding, however, we rely only on Vice President Simon's discussions regarding the 401(k) plan with employees Anderson and Hosely on February 23, and Simon's May 15 statements to Anderson of what could be accomplished with the Union out of the way. We need not pass on the other instances of alleged direct dealing, as finding additional violations would not affect the Order. Also, because we find that these statements constituted direct dealing in violation of Sec. 8(a)(5) and (1), we need not decide whether they also constituted promises of benefit in violation of Sec. 8(a)(1). Any such violations would be substantially remedied by the remedy for the direct dealing violations.

III. THE UNION'S INFORMATION REQUEST

In its May 10 letter, the Union requested information regarding both the existing Verona facility and the new Helgesen facility, in furtherance of the Union's inquiry into the nature of operations at the two sites and the Union's grievance contending that the contract should apply to Helgesen. For example, the Union requested information about the job classifications, job titles, names of supervisors and executives, and supervisory responsibilities at both the Verona and Helgesen facilities. The Union also requested information about differences between job classifications at the facilities, differences in operating procedures at the facilities, transfer of work between the facilities, and the potential for layoffs at the Verona facility as a result of the opening of the Helgesen facility.

We adopt the judge's finding, for the reasons stated in his decision, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide information to the Union. But we also order the Respondent to produce additional information. The judge found that only certain of the Union's requests regarding unit work at Verona and regarding the transfer of product to Helgesen were relevant, and he ordered the Respondent to provide only that information. The judge found that, in contrast, the information sought by the Union regarding the establishment, management, and staffing of the new Helgesen facility was not relevant. Contrary to the judge, we find that all of the requested information was relevant to the Union's performance of its representational duties and should have been provided.

Many of the Union's inquiries (in addition to those that the judge found to be relevant) sought information related to the existing bargaining unit at Verona. Such information is normally considered to be presumptively relevant. *Newcor Bay City Division,* 345 NLRB 1229, 1237 (2005). The Respondent has not rebutted this presumption or shown that it should not apply here. Accordingly, we find that the Respondent violated Section 8(a)(5) by failing to provide the requested information concerning the Verona unit.

As explained, the Union also requested information concerning the Respondent's Helgesen operations, which the judge found not relevant. Because that information did not pertain to the Verona bargaining unit, the Union had the burden to show the relevance of the information. *Shoppers Food Warehouse,* 315 NLRB 258, 259 (1994). The Board uses a broad, discovery-type standard in determining the relevance of information requests, and a showing of possible or potential relevance is sufficient to establish the employer's duty to provide the information. Id. In determining whether information is relevant to the processing of a grievance, the Board does not pass on the merits of a union's claim that the employer has breached the collective-bargaining agreement. Id. Here, the Union has shown that it had legitimate concerns about the possible transfer of unit work from Verona to Helgesen and had filed a grievance related to those concerns. In these circumstances, we find that the Union has shown that the information requested about nonunit Helgesen operations was relevant. Id. at 259–260. Except for asserting lack of relevance, an assertion we reject, the Respondent has offered no defense for its failure to provide the requested information concerning Helgesen. We therefore find that the Respondent violated Section 8(a)(5) by failing to produce that information.

IV. THE RESPONDENT'S "NONUNION" FACILITY STATEMENTS

The judge found that the Respondent unlawfully threatened employees by effectively announcing on several occasions that the Helgesen facility would be "nonunion." We disagree. The Respondent's officials never told the employees explicitly that the Helgesen facility would be "nonunion," but instead said that it was a new facility that would not have a bargaining unit upon its opening. This was merely a statement of the Respondent's position, with which we and the judge have agreed, that the collective-bargaining agreement did not apply to the new facility. Thus, the Respondent's statement was simply one of fact: the Helgesen facility was not covered by the contract. Contrary to the judge, we find that the Respondent did not violate Section 8(a)(1) merely by stating to the employees that this was so. In addition, the Respondent never told employees that they could not apply for positions at Helgesen, and thus never indicated to employees that union membership was incompatible with employment at Helgesen. In fact, the Respondent's officials told employees that they would be able to apply at some later date. There was also nothing in those circumstances that would cause the employees to interpret the Respondent's statements as suggesting that future efforts to organize the Helgesen plant would be futile. Thus, the Respondent's statements are easily distinguishable from the cases relied on by the judge and the General Counsel.[6] Accordingly, we reverse the judge and dismiss this allegation.

[6] See *Ryder Truck*, 318 NLRB 1092, 1094 (1995) (employees specifically told that new facility would be "nonunion" and made to affirm in writing that they did not seek union representation at new facility); *Kessel Food Markets*, 287 NLRB 426, 447 (1987) (successorship case where employees were specifically told that the new facility would be "nonunion").

ORDER

The National Labor Relations Board orders that the Respondent, Certco Food Distribution Centers, Madison, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bypassing the Union and dealing directly with employees by indicating that their wages and benefits would improve if they participate in the Certco 401(k) pension plan rather than the Teamsters Central States Pension Fund.

(b) Failing and refusing to provide requested information regarding operations at its Verona Road and Helgesen Drive facilities, and information clarifying the relationship between the two facilities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Promptly furnish the Union with all of the information requested in the Union's May 10 information request letter.

(b) Within 14 days after service by the Region, post at its Verona Road facility in Madison, Wisconsin, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 23, 2004.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT bypass Teamsters Local Union No. 695, affiliated with the International Brotherhood of Teamsters, and deal directly with you by indicating that your wages and benefits will improve if you participate in the Company 401(k) Plan rather than the Teamsters Central States Pension Fund.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to provide requested information regarding operations at our Verona Road and Helgesen Drive locations, which is relevant and necessary to the Union as the collective-bargaining representative of our warehousemen and drivers at Verona Road.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights listed above.

WE WILL promptly furnish the Union with all of the information requested in the Union's May 10, 2004 information request letter.

CERTCO FOOD DISTRIBUTION CENTERS, INC.

Andrew S. Gollin, Esq., for the General Counsel.
Steven C. Zack, Esq., for the Respondent.
Scott D. Soldon and *YingTao Ho, Esqs.,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Madison, Wisconsin, on March 14 and 15, 2005, pursuant to a consolidated complaint that issued on September

30, 2004.[1] The complaint alleges various violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) following the Respondent's opening of a new nonunion facility in Madison, Wisconsin. The Respondent's answer denies all violations of the Act. I find that the Respondent did violate Section 8(a)(1) of the Act substantially as alleged in the complaint and Section 8(a)(5) of the Act by dealing directly with employees and failing to provide the Union with certain requested information. The evidence does not establish any Section 8(a)(3) violation. I find that the Respondent's failure to apply the collective-bargaining agreement to the new facility did not violate the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Certco Food Distribution Centers, the Company, is a corporation, engaged in the storage and distribution of grocery and related items from its warehouses located in Madison, Wisconsin, at which it annually receives goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Wisconsin. The Company admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that Teamsters Local Union No. 695, affiliated with the International Brotherhood of Teamsters, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Company has recognized the Union as the collective-bargaining representative of its warehousemen and drivers since 1962. The current collective-bargaining agreement is effective by its terms from July 1, 2002, through June 30, 2005. The preamble states that the contract applies to "all employees of . . . [Certco] engaged in work covered by this Agreement, all of Madison, Wisconsin." That wording has been repeated without change since the initial collective-bargaining agreement of 1962. Article 14 provides that Certco will not subcontract to an outside company "for the purpose of circumventing . . . this Agreement." Immediately following that prohibition is the following provision: "However, it is understood that nothing contained in this Agreement shall prohibit the Employer from opening new facilities [or] . . . transferring operation[s] from one facility to another . . . ." Article 14, Subcontracting, was changed in the contract entered into on October 16, 1970, and has been repeated without change thereafter.

The central issue in this case is whether the Company could establish a new warehouse in Madison, Wisconsin, hire new employees to work there, and fail and refuse to apply the collective-bargaining agreement to the employees at the new facility.

The Company has operated and continues to operate a warehouse at 5321 Verona Road in Madison (the Verona Road warehouse or Verona Road). The warehouse has, over the past 40 years, expanded and currently has approximately 400,000-square feet of space. From the warehouse, the Company supplies grocery and related items to grocery stores in Wisconsin, northern Illinois, southeastern Minnesota, and northeastern Iowa. The Company's largest customer is Woodman's, a chain of full service supermarkets.

Company President Donald Watzke explained that, in late 2003, Certco was approached by Woodman's regarding supplying approximately 18,000 items that had been being provided to the Woodman's stores by a different company. The items, described by Watzke as general merchandise items, included health and beauty aids. Certco was handling many of these same items from its Verona Road warehouse, but not at the volume that would be anticipated if it became the supplier of these items to Woodman's. Consequently, another location was sought. After evaluating facilities in Beloit, Janesville, and Waunakee, Wisconsin, the Company settled upon a 120,000-square foot facility located on Helgesen Drive in Madison (Helgesen or the Helgesen Drive warehouse).

On February 16, the Company received a letter from the Central States Pension Fund, to which the Company contributes pursuant to the collective-bargaining agreement. The letter advises of the Fund's "deteriorating funding status" caused by market losses following the terrorist attacks of September 11, 2001, and the bankruptcy of Consolidated Freightways, a major contributing employer to the Fund. The Company made several communications to employees regarding its concerns about the financial stability of the Fund. Company officials also expressed their confidence in the Certco 401(k) Plan, which is offered to nonunit clerical and supervisory employees as well as the employees that were hired at Helgesen.

In mid-February, shortly after receipt of the foregoing letter, the Company announced the opening of the Helgesen Drive warehouse as follows:

> Certco, Inc[.,] is opening a new facility on the east side of Madison as a result of a new business opportunity. The facility will be a different and separate operation from the facility and operation on Verona Road. Certco, Inc. will be hiring new employees for the facility. Since it is a new facility with new employees, it does not have a bargaining unit.

B. Facts

Employees had heard rumors of a new warehouse in January. Chief Shop Steward Howard Hosely advised Teamsters Business Representative Larry Weden of the "rumor about them opening this facility," and Weden told him that "we had to sit back and wait to see what happened." The written announcement, set out above, was sent to employees in their paychecks. Executive Vice President and Chief Operating Officer Randy Simon presented a copy of the written announcement to Business Representative Weden. On February 23, Vice President Simon held a meeting with the first-shift employees and later with the second-shift employees. He began both meetings by

[1] All dates are in 2004, unless otherwise indicated. The charge was filed on June 4 and was amended on July 14 and August 31.

announcing that the Company had received the February 16 letter noted above from the Pension Fund, stated that the letter would be posted, and requested that the employees read the letter. He then read the announcement of the opening of the new warehouse and then answered any questions. A summary of each meeting was prepared by Simon's secretary Adel Haldiman who was present at each meeting. Simon denied that he was asked about transferring at the first meeting. The summary of the second meeting reflects that an employee asked if he would be transferred and that Simon answered "anyone can fill out an application, your Union contract states that you are in this facility." Although Simon had with him a typed explanation relating to wages at the new facility, he denied that he was asked about wages and testified that he did not read the explanation. The explanation states:

> The wages at the new facility are higher because their fringe benefit package is not as costly as the Verona Road package. The new employees have a 401(k) pension plan that provides them with comparable pension benefits at less cost. Because of this, Certco was able to provide the employees with a higher wage rate.

Chief Steward Hosely recalled that, at the first-shift meeting, Simon stated that the new warehouse was going to be handling health and beauty aids and housewares and that it "was not going to be part of the bargaining unit." He recalled that Simon was asked whether Verona Road employees would be able to work there and that Simon replied that "there would be no postings . . . [but] somebody could apply for that job if they wanted to." Contrary to Simon's denial that he mentioned anything about wages, Hosely recalled that Simon stated that "the starting wage there would be a dollar an hour more than the starting wage at the Verona Road facility . . . because Certco would not have to deal with the expensive Central States Pension at the Helgesen site . . . [that the employees] would have health insurance . . . [and] a company sponsored 401(k) Fund there."

Employee Gary Anderson confirmed that Simon began the meeting by referring to the letter from the Pension Fund, stating that he was concerned about the contents of the letter and that he would post it. Simon then announced the opening of the Helgesen Road warehouse, stating that it would be nonunion and that if employees wished to apply they should do so through Mark Squires, human resources coordinator. Although not recalling any mention of wages, Anderson recalled that Simon did state that, "since there would be no pension Fund there [at the Helgesen warehouse] there would be a 401(k)."

Employee Steve Anderson recalled that, when announcing the opening of the new facility, Simon stated that it would be nonunion, that current employees "could fill out an application but . . . it would be nonunion . . . ."

Employee David Henning recalled that, after announcing the opening of the Helgesen Drive warehouse, Simon stated that "he was going to be able to pay them more money to start because he wouldn't have to pay the expensive Teamster pension."

Human Resources Coordinator Squires did not deny that, when Simon told employees that they could fill out applications, he also stated that they could give them to Squires.

Simon's recollection of the questions he was asked and his responses was hazy at best. He acknowledged at one point that he was relying upon Haldiman's notes of the meeting rather than his recollection. Gary Anderson and Steve Anderson both recall that Simon stated that the facility was going to be nonunion. I find that the Andersons testified to what Simon communicated rather than what he actually said. The written announcement states that the new facility "does not have a bargaining unit." Hosely recalled that Simon stated that the facility "was not going to be part of the bargaining unit." Immediately following his announcement of the opening of a new facility that had no "bargaining unit," Simon was asked if "they," referring to the unit employees, could work there. Hosely, whom I credit, testified that Simon answered that "there would be no postings . . . [but] somebody could apply for that job if they wanted to." The absence of postings pursuant to the contract confirmed that the Company intended to operate the new facility as a nonunion facility. Any doubt that the facility was to be nonunion was erased when, as Hosely credibly testified, Simon informed the employees that "the starting wage there would be a dollar an hour more than the starting wage at the Verona Road facility . . . because Certco would not have to deal with the expensive Central States Pension at the Helgesen site . . . [that the employees] would have health insurance . . . [and] a company sponsored 401(k) Fund there."

There is no probative evidence that any Verona Road employee was informed that he or she could not apply for a job at Helgesen. I find that employee Ernest Seay was mistaken in recalling that, when an employee asked about applying, Simon responded that employee would not be able to apply "at this time" but would be able to apply at "a later time." Employee Steve Anderson admitted that he was not actually told that he could not apply. He concluded that he could not apply because of the Company's designation of Helgesen as a nonunion facility.

On February 27, the Union filed a grievance protesting the "opening of a new facility without covering that facility by the Union Contract and offering the bargaining unit persons the available work opportunities." The Company denied the grievance stating that the grievance was not arbitrable, that the new facility was not part of the bargaining unit, and that the "Verona Road labor agreement does not extend to employees at the new facility, nor does it give any right to Verona Road employees with respect to the new facility." On March 17, the Union filed for arbitration. On March 22, counsel for the Company wrote the Union stating that "Certco does not believe that this matter is arbitrable as set forth in its response to the grievance."

Following Vice President Simon's announcement, employee Gary Anderson approached Squires regarding the 401(k) plan on the afternoon of February 23. Squires took him to Simon's office. Employee Tom Hanko was also present, but did not testify regarding the conversation. Anderson questioned Simon regarding the benefits of the 401(k) plan. They also spoke about the Pension Fund. Simon expressed his opinion that the Pension Fund was "a bad deal," and Anderson agreed with him. They discussed the Helgesen facility, and Simon stated that the starting wages would be a $1-an-hour higher "because of the fact that there was no pension there." Anderson asked what it would

mean if "we get a 401(k) implemented at Certco [Verona Road], and Simon said that "wages would go up." Anderson requested a specific figure and Simon said "a dollar." Anderson stated that he would talk with his fellow employees. Simon did not either encourage or discourage him from doing so. He did so.

Chief Steward Hosely received various questions following Simon's announcement. Around 3 p.m. on the afternoon of February 23, Hosely went to Simon's office and stated to him that several people had asked him "to come up and talk to you about the 401(k)." Supervisor Dan Pechan, who became manager of the Helgesen Drive warehouse, was in the office, and he remained. Simon responded to Hosely saying, "I figured you'd be up here sooner with concerns, you know." Hosely noted that "the pension always takes care of itself." Simon repeated that one reason that the Company was able "to pay a dollar an hour more to start" at Helgesen was because it did "not have to worry about the pension fund at the Helgesen site." Hosely asked Simon to explain the manner in which the 401(k) plan worked, and Simon explained, "[Y]ou contribute 6 percent and [the Company contributes] 3 percent." Hosely asked how the Fund was doing, and Simon replied, "pretty good" but gave no specifics. Hosely asked if he could be more specific, and Simon replied that he needed to "ask the company lawyer if I could give you specifics." He then commented that he was surprised that "the Union is not mad at you up here talking to me about it." Hosely noted that Business Representative Weden was "a very open minded person and everything would have to be discussed with him anyways." Supervisor Pechan stated that if Hosely had the 401(k) plan from when he began with Certco, instead of receiving a $2500 a month Pension Fund benefit, "you'd be looking at now 10 to $15,000.00 a month." As Hosely was leaving, Simon said to "talk amongst yourselves." He then smiled and said, "See, we can do wonderful things here." Simon did not deny the foregoing comment.

In early March, the complaint alleges the date of March 3, Ron French, who was steward for the drivers at that time, observed that two new drivers from the Helgesen Drive warehouse were transporting products from the Verona Road warehouse to Helgesen. He and Chief Steward Hosely approached Vice President Simon with regard to this. French argued "that it should be Local 695 members hauling the product from this location at Verona Road to the Helgesen location." Simon acknowledged the Union's concern and stated that he would consult with President Watzke and get back to the Union. The conversation then "transitioned into the item of our pension and the concerns from Randy Simon about our pension." French recalled that Simon referred to the company 401(k) plan and stated that "he could do better for the employees at the Verona Road location . . . [r]ather than the pension plan that we had at this time." French responded that he was not "authorized to bargain in any way, shape or form on our pension plan, that I stood behind it and that I couldn't speak for the members." The foregoing disclaimer establishes that French communicated that he had no authority to negotiate in that regard. See *McDaniel Ford, Inc.,* 322 NLRB 956, 962 (1997).

Simon denied making any promises in the foregoing three conversations. I do not credit that testimony. Shortly before the conversation with Gary Anderson on February 23, Simon had announced that employees at the new warehouse would be receiving a higher starting wage because the Company would not have to deal with the "expensive Central States Pension." It strains credulity to believe that, when Anderson asked what it would mean if "we get a 401(k) implemented" at Verona Road, Simon would not assure him that the Company would treat the union represented employees in the same manner as its nonunion employees. Anderson stated that Simon did so, answering that "wages would go up." Similarly, I credit employee Ron French and find that Simon, after expressing concerns about the union pension, mentioned the company 401(k) plan and stated that "he could do better for the employees at the Verona Road location . . . [r]ather than the pension plan that we had at this time."

Simon consulted with President Watzke who agreed that a bargaining unit driver should transport products from Verona Road to Helgesen. Simon informed both Hosely and French of this. Since that time, unit drivers have performed this work.

On March 12, pursuant to the Company's request, union officials including Secretary-Treasurer Mike Spencer, Business Representative Weden, and various stewards including Hosely and French met with counsel to the Company, Steven Zach, President Watzke, Vice President Simon, and others regarding the Pension Fund. Weden recalls stating to President Watzke that the Union did not have "any crystal ball to enlighten him or the Company as to where the fund was going to be going." The company representatives expressed concern that the February 16 letter reflected that the pension was underfunded but that they were unable to find out the amount of the Company's unfunded liability. President Watzke said that he was "putting money into a black hole, that these folks weren't going to see anything out of the pension fund." Weden disputed that and referred to former employees who were drawing a pension. Watzke mentioned 401(k) plans, and the tone of the meeting changed. It concluded when Secretary-Treasurer Spencer stated that the Union was not there to negotiate and to "[s]ee us at contract time."

In late March, Steward Ron French observed that full pallets ready for delivery to stores were being brought to Verona Road by Helgesen drivers and cross-docked. The term "cross-docked" is used for orders that have not been stored in the Verona Road warehouse but have been packed for delivery to specific stores, brought to the Verona Road loading dock, and then placed upon the truck that is going to the specific store for which the packed pallet is destined. Prior to the opening of the Helgesen warehouse, these prepacked pallets were chiefly meat products packed at large packinghouses. French spoke with Vice President Simon regarding the delivery of these full Certco pallets from Helgesen by the two Helgesen drivers, stating his contention that the delivery of Certco packed products was unit work. Simon responded that "he would designate that work over there as he sees fit." Simon again broached the matter of pensions, stating again that "he though that Certco could do better for their employees at that location [Verona Road] without the pension plan." French repeated Secretary-Treasurer Spencer's statement that the pension issue was "for contract time . . . at a later date." On March 24, French filed a

grievance to which the Company did not respond. The Union did not file for arbitration of this grievance, and there is no complaint allegation relating to it.

Also in late March, employee Gary Anderson spoke again with Vice President Simon requesting information about how a 401(k) plan worked. Simon informed him that representatives from U.S. Bank were coming to talk to Certco's nonunion employees regarding their 401(k) plan. Anderson stated that he would like to attend the meeting. Simon answered that could be a possibility, he "couldn't give me an answer" at that point. Anderson, apparently referring to conversations that he had with employees following his conversation with Simon on February 23, noted that there were "a lot of people that for some reason or another don't trust Certco to keep that profit sharing in place." Simon responded that he was not "Darth Vader . . . [and] didn't want to destroy us. He wasn't up there to—for our demise."

At some point shortly after the foregoing conversation, Simon informed Anderson that the Company would have a meeting with representatives of U.S. Bank for any unit employees who were interested. Anderson spread the word. Contrary to Anderson's initial understanding, the meeting did not include nonunit employees. On March 30, Anderson and many other unit employees attended a meeting that the Company had set up with U.S. Bank representatives. President Watzke, Vice President Simon, and Human Resources Coordinator Squires were also present. Prior to the meeting, Squires asked Chief Steward Hosely "if it was okay with the Union to have that meeting." Hosely stated that it was. Anderson asked Hosely if he "could invite some friends," and Hosely expressed no objection. No representative of the Company contacted Business Representative Larry Weden regarding this meeting. The U.S. Bank representatives presented the same data regarding the 401(k) plan that had been presented to the nonunit employees. Following the presentation, employee Dave Hennings asked whether the employees would recoup in wages money saved on the 401(k) plan. He recalled that President Watzke answered that "there was only so much money and . . . [that] would have to be bargained." Employee Anderson testified that, before Watzke answered Hennings, Vice President Simon said, "[T]here would be a raise" and that Hennings asked him to be more specific at which time President Watzke interrupted stating that the employees were there "for information about 401(k) and that anything along those lines would have to be negotiated with the Union." Simon did not deny making the foregoing statement in the March 30 meeting.

The Company, on April 15, received a letter from the Pension Fund advising that its underfunded liability if it were to withdraw from the fund at that time would be approximately $4 million. In May, the Company sent General Counsel's Exhibit 8, a one-page undated memorandum signed by President Watzke and Vice President Simon, to unit employees. The memorandum states that it is being sent "to keep you informed on the status of your pension fund." It refers to the financial condition of the Pension Fund and continues as follows:

> We have now received word that the current Fund deficit is 9.7 billion dollars. Certco's liability for this deficit is almost 4 million dollars.
>
> We are deeply concerned about this.
>
> We are concerned about how this may affect the long-term financial status of the Company and your pension benefits.
>
> We are analyzing our options at this point and will address them with your union at such point as is appropriate.

Testimony establishes that there would be no liability if the Company continued to participate in the Fund as it was doing pursuant to the existing contract. There is no evidence regarding the current withdrawal liability, if any. The memorandum does not explain that the Company was liable for the $4 million only if it were to withdraw from the fund.

In late May or early June, the Company sent unit employees another undated memorandum signed by Watzke and Simon. The memorandum is a one-page cover sheet to which testimony given before a House of Representatives subcommittee on March 18 by the vice president of United Parcel Service and April 29 by the president of the Motor Freight Carriers Association is attached. The memorandum states, "This testimony is frightening."

On June 23 and again on October 13, counsel for the Company wrote the Union asking whether the Union would be interested in commencing contract negotiations "earlier than we normally begin." Business Manager Weden testified that, historically, the parties begin bargaining about 60 days before expiration of the collective-bargaining agreement. The Union did not respond the foregoing correspondence.

On May 15, a retirement party was held for an employee at a bar in Madison. Employee Steve Anderson testified that he was concerned because of the communications he had received regarding the Pension Fund and seeing products going to the Helgesen facility. In the course of the evening, he spoke with Vice President Simon. He asked if Simon would like to see the Union dissolved. Simon replied that he would, that there were "things that the Company could do for the employees at Certco without the Union such as a 401(k) Fund incentives and company insurance. Things that they cannot do with the Union in the place at this time." Anderson responded that he had been there a long time and that the Pension Fund meant a lot to him. Simon replied that he understood, but "they had to figure out a way to keep the younger employers . . . still working at Certco, [a]nd the way of doing that would be offering a 401(k)." Simon did not deny the foregoing statements. He testified that he was inebriated and did not recall making them. Anderson agrees that Simon was inebriated. Anderson acknowledges that he drank alcohol at the party but testified that he remained sober because he had to drive to his home across town after the party. I credit Anderson.

On May 10, the Union sent the Company a questionnaire with 43 questions relating to the Helgesen Road facility. The Company did not respond. The letter, in the first paragraph, refers to the Company's "attempts to remove work from Local 695 jurisdiction" and, in the final sentence of the second para-

graph states, "We need information related to your transfer of work to prepare for effects bargaining."

Watzke testified that, upon learning of Woodson's desire to have Certco supply items that had previously been supplied by a different company, we "realized there was no way that we could handle that in our existing facility," that the Company was used to handling cases and big boxes, and that smaller items "like toenail clippers and lipstick . . . [would require] a different type of picking system." After investigating the manner in which other suppliers of these items worked, Watzke decided that the Company should adopt "a model used by Walgreens with racks four levels high and . . . totes . . . rather than cases on pallets." He acknowledged that totes were used at Verona Road, testifying, "We had used a few totes in our packroom" but noted that "our packroom is a very small part of our facility at Verona Road." The foregoing admission confirms that the work being done at Helgesen was virtually the same work that had been performed at Verona Road albeit at a higher volume. Any argument to the contrary is refuted by the notes of the February 23 meeting which reflect that second-shift employee Terry Hartlich asked whether "the whole packroom [would] move to the new warehouse." Simon responded that "some packroom product will go but not all." In addition to health and beauty aids, other items including nuts and seasonal candy, i.e., Halloween, Valentine's Day, and Easter, were moved to the Helgesen Drive warehouse.

President Watzke explained that, although a new addition to the Verona Road warehouse had given the Company additional space, he anticipated that the Company "would use up all the space . . . [to increase] our product line in our existing lines." He estimated that approximately 5000-square feet of the Verona Road warehouse was devoted to general merchandise items that were to be warehoused at Helgesen. The testimony does not establish whether that estimate included the seasonal candy and nuts, which certainly are not health and beauty aids and would appear to be grocery items. Regardless of the volume of product involved, the record establishes that many identical items and other items similar to those previously warehoused and shipped from the Verona Road warehouse are now being warehoused and shipped from, or prepared for shipment at, the Helgesen Drive warehouse.

Product shipped to either warehouse is first entered into a computerized inventory and then placed in numbered bins at the warehouses by receiving employees who use forklifts, pallet jacks, and similar equipment. Customer orders are given to order pickers who go down the aisles and, using the same equipment, obtain the product from the appropriate bin. The product is loaded onto pallets destined for the specific customer as identified by labels generated by the computer. A typical loaded pallet is 6-feet high. The pallets are taken to the specified locations on the dock for loading onto the truck that will take the product to the customer. The loader, driving a forklift, will load the pallets onto the appropriate trailer. Verona Road drivers work on two shifts, the first shift reporting as early as 4 a.m. and the second shift in the afternoon. Drivers deliver the product to the customers on their respective routes.

There are two drivers at the Helgesen warehouse. Normally they make two deliveries a day of fully loaded pallets destined for specific stores on the routes of the Verona Road drivers to the Verona Road loading dock. These pallets are cross-docked. The Helgesen drivers also deliver directly to the two Woodman's stores in Madison. Consistent with the Union's protest in early March, product that is received at Verona Road but warehoused at Helgesen is delivered to Helgesen by Verona Road drivers.

The Company selected Dan Pechan, a supervisor at Verona Road, as warehouse manager at Helgesen. He is assisted by Supervisor Tracy Daubenspeck, who was also a supervisor at Verona Road. The Company's operations are computerized and inventory control, payroll, and records are all centrally maintained at Verona Road. Insofar as personnel records are maintained at Verona Road, Pechan would, before disciplining an employee, need to contact that facility to obtain the employee's personnel file.

There is no evidence that any employee at Verona Road sought to apply at Helgesen. On February 23, the Company stated that the positions at Helgesen would not be posted. The seniority of all of the employee witnesses who testified would have resulted in significant pay cuts had they applied and been hired as new employees. The Company staffed the Helgesen warehouse by hiring employees through a temporary agency. Human Resources Coordinator Squires also sent applications made at Verona Road to Pechan when the facility opened and referred one of the two Helgesen drivers to that facility. Pechan testified that he made the hiring decisions. Although maintaining that Pechan makes all final discharge decisions, Squires admitted that Pechan would consult with him to confirm whether a proposed action was consistent with company policy.

There has been no interchange between the warehousemen. Although Verona drivers see the Helgesen drivers at the fuel pump at Verona Road and at the stores to which they both deliver, that is, with one exception, the extent of their contact. The exception is that, in March 2005, a year after the opening of the Helgesen warehouse, all drivers attended a training session regarding use of a new computer system on their trucks. The foregoing contact does not establish the interchange of any work. *Bowie Hall Trucking*, 290 NLRB 41, 43 (1988).

No unit positions were lost at Verona Road. As of March 1, 2004, there were 126 bargaining unit employees at Verona Road. On March 1, 2005, there were 157. There are approximately 25 employees at Helgesen—23 warehousemen and 2 drivers.

C. Analysis and Concluding Findings

1. The 8(a)(1) allegations

The complaint, in subparagraph 6(a), alleges that the Respondent, by Simon, Watzke, and Pechan, on February 23 and in early March, informed employees that union membership "was incompatible with hire . . . at Helgesen . . . by telling them they could not transfer or apply for a position at the Helgesen . . . facility because the Helgesen . . . facility was non-union or that no Union employees would be working there." There is no evidence of any such communications by either Watzke or Pechan. The Respondent's announcement that the new facility would not have a bargaining unit coupled with the statement that the jobs would not be posted and announcement of a higher

starting wage and a 401(k) plan rather than "the expensive Central States Pension" effectively announced that the Respondent was going to operate the new facility as a nonunion facility. Although Simon did not state that unit employees could not apply, employee Steve Anderson concluded that he would not be considered for a position at the new facility. The conclusion that Anderson made from Simon's statements, that union membership was incompatible with employment at the new nonunion facility, was logical. "When an employer tells applicants that the company will be nonunion before it hires its employees, the employer indicates to the applicants that it intends to discriminate against . . . [them] to ensure its nonunion status." *Kessel Food Markets*, 287 NLRB 426, 429 (1987). See also *Ryder Truck Rental*, 318 NLRB 1092, 1094–1095 (1995). In announcing to its union affiliated unit employees prior to hiring the work force at the Helgesen warehouse that the facility would be nonunion, the Respondent informed them that union affiliation was incompatible with employment at that location in violation of Section 8(a)(1) of the Act.

Subparagraph 6(b) of the complaint alleges that the Respondent "threatened employees with adverse consequences unless the employees persuaded the Union to drop the Teamsters Union Pension Fund for the Respondent's 401(k) plan." The General Counsel argues that the foregoing threat is implicit in Simon's presentation on February 23 in which he first communicated the Respondent's concerns regarding the Pension Fund and immediately followed those remarks by announcing the opening of the nonunion facility. As hereinafter discussed, the collective-bargaining agreement permits the Respondent to open new facilities. There was no threat either explicit or implicit in the announcement made to employees on February 23. I shall recommend that this allegation be dismissed.

Subparagraph 6(c) of the complaint alleges that the Respondent, on February 23 and on or about March 3 and 26, promised employees "a pay increase and a better pension plan in order to persuade employees to give up their contractual Teamster Union Pension Fund for Respondent's 401(k) Fund." On February 23, Vice President Simon informed employee Gary Anderson that employees would receive a $1-an-hour wage increase if they abandoned the Central States Pension Fund and adopted the Certco 401(k) plan. On that same day, he implied improved benefits when, in his discussion with Chief Steward Hosely, he stated that Certco was able "to pay a dollar an hour more to start" at Helgesen because it did "not have to worry about the pension fund," and, as Hosely was leaving, stated, "See, we can do wonderful things here." On March 3, although not specifying an amount, Simon informed employee Ron French that "he could do better for the employees at the Verona Road location . . . [r]ather than the pension plan that we had at this time." He repeated this to French in late March. On March 30, in the discussion following the presentation by the representatives of U.S. Bank, Simon stated that, with the 401(k) plan the employees would receive a raise. Watzke's comment that this "would have to be negotiated with the Union" did not disavow Simon's representation establishing what would be on the bargaining table if the Union adopted the Certco 401(k) plan. Each of the foregoing statements extended a promise of benefit if the Central States Pension Fund were to be replaced with the Certco 401(k) plan. An employer may not seek to exert pressure on a union in order to further its bargaining objectives by making promises of a wage increase to unit employees. *Ad-Art, Inc*., 290 NLRB 590, 606 (1988). The foregoing promises of benefit independently violated Section 8(a)(1) of the Act.

Subparagraph 6(d) alleges that the Respondent, by Randall Simon, on May 15 at a tavern, impliedly promised better working conditions to encourage employees to persuade the Union to agree to the company 401(k) Fund. Simon, in his conversation with employee Steve Anderson, explicitly promised improved benefits "such as a 401(k) Fund incentives, company insurance. Things that they cannot do with the Union in the place at this time." That statement promised improved benefits upon abandonment of the contractual pension benefit which Anderson stated, "meant a lot to him," and it violated Section 8(a)(1) of the Act.

2. The direct dealing allegations

The complaint, in paragraph 8, sets out various instances, several of which are coextensive with the foregoing 8(a)(1) allegations, in which it is alleged that the Respondent bypassed the Union and dealt directly with employees. As held by the Second Circuit Court of Appeals in *NLRB v. General Electric Co.*, 418 F.2d 736, 759 (1969), direct dealing occurs when the employer chooses "to deal with the Union through the employees, rather than with the employees through the Union." On February 23, Vice President Simon announced the establishment of the Helgesen facility and referred to the wages and benefits, linking the higher starting wage to the presence of the Respondent's 401(k) plan as opposed to the Union's "expensive" Pension Fund. The gratuitous injection of the relative costs of the 401(k) plan and the Pension Fund into the announcement suggests an ulterior motive. The suggestion of an ulterior motive is confirmed by Simon's conversations thereafter in which he promised a wage increase if unit employees were under the Certco 401(k) plan. The Respondent began sending documents to employees in which it expressed concern regarding the Pension Fund. Although none of those communications are alleged to violate the Act, the sending of them suggests a pattern which, "when examined in its totality, reveal direct dealing." *NLRB v. Pratt & Whitney Air Craft Division*, 789 F.2d 121, 135 (2d Cir. 1986). There is no testimony contradicting Business Representative Weden's testimony that, historically, the parties have commenced negotiations approximately 60 days prior to the expiration of a contract. The Respondent's requests in June and October to begin negations "earlier" suggests a desire to capitalize upon its touting the Certco 401(k) plan to unit employees while denigrating the Union's Pension Fund. It is in this context that I address the allegations contained in paragraph 8 of the complaint.

The complaint, in subparagraph 8(a), alleges that the Respondent, by Vice President Simon, "bypassed the Union and bargained directly with employees concerning their wages and pension" on February 23, on various dates in March, and on May 15. I find that Simon's informing employee Gary Anderson on February 23 that employees would receive a $1-an-hour wage increase if they abandoned the Central States Pension Fund and adopted the Certco 401(k) plan and stating to Steward

Ron French in early March and late March that "he could do better for the employees at the Verona Road location . . . [r]ather than the pension plan that we had at this time" constituted direct dealing. I also find that the Respondent engaged in direct dealing when Simon stated, in the discussion following the presentation by the representatives of U.S. Bank on March 30, that with the 401(k) plan the employees would receive a raise.

On May 15, Simon, speaking to employee Steve Anderson, promised improved benefits that the Respondent could not implement "with the Union in the place at this time."[2] The Respondent argues that this did not constitute direct dealing and cites the decision of the court of appeals in *Americare Pine Lodge Nursing v. NLRB*, 164 F.3d 867, 878 (4th Cir. 1999). In that decision the court of appeals refused to enforce the portion of the Board Order in *Americare Pine Lodge Nursing*, 325 NLRB 98, 101, 104 (1997), that found direct dealing when, on a smoke break, a supervisor who was a friend of the employee, asked the employee what she thought of the employer's wage offer. The court of appeals reasoned that "friend-to-friend conversations outside of the workplace" did not constitute "evidence of direct dealing." In so finding, the court of appeals noted that "there was no evidence of an attempt to enter into any quid pro quo negotiation with employees outside of the proposal on the table before the Union . . . [nor did the supervisor] communicate, either expressly or impliedly, that through dealing with . . . [the employer], the employees could achieve the same or better results than they could achieve through the Union." In the instant case there was a quid pro quo. Simon promised improved benefits "such as a 401(k) Fund incentives, company insurance" that the Respondent could not implement "with the Union in the place at this time." The foregoing direct dealing violated Section 8(a)(5) of the Act.

The complaint, in subparagraph 8(b) alleges that Supervisor Dan Pechan bargained directly with employees on February 23. Hosely's testimony establishes that Pechan stated what he believed Hosely's monthly benefit would be if he had the 401(k) plan rather than the Pension Fund. The foregoing statement of opinion did not constitute direct dealing. I shall recommend that this allegation be dismissed.

The General Counsel, in his brief, withdrew subparagraph 8(c) of the complaint.

Subparagraph 8(d) alleges that the Respondent bypassed the Union and bargained directly with employees by sponsoring a meeting with U.S. Bank officials to explain Respondent's 401(k) plan. The Respondent, citing *Fabric Warehouse*, 294 NLRB 189 (1989), argues that the holding of the meeting did not violate the Act. I agree. In *Fabric Warehouse* the Board specifically held that describing the wages and benefits of nonunit employees does not violate the Act in the absence of "any implied promises that the wages and benefits of the employees at the meeting will be adjusted if the union is voted out." In that case, as in this case, comments made in the meeting were found to violate the Act. Nevertheless, the holding of the meeting was found not to violate the Act. I shall recommend that the allegation that the sponsoring of the meeting violated the Act be dismissed.

3. Allegations concerning the new facility

Paragraph 7 of the complaint alleges that the Respondent refused to consider and hire unit employees for employment at the Helgesen Drive facility. As already discussed, several employees who testified confirmed that they were initially interested in working at Helgesen but did not apply because they were informed that the Respondent intended to operate the facility as a nonunion facility and, therefore, all applicants would be new hires and begin at the starting wage. The unit employees who testified all had sufficient seniority so that they were earning more than the Helgesen starting wage, and none applied. Despite the Respondent's implicit discouragement of unit applicants, there is no evidence that the Respondent refused to consider any unit employee for hire. No unit employees applied. In *GSX Corp. of Missouri,* 295 NLRB 529 (1989), cited by the General Counsel, the Board held that the layoff of unit employees and failure to rehire them for work claimed by the union violated the Act. In finding an unlawful failure to rehire despite the absence of any applications by the employees, the Board relied upon the union's claim for the work involved coupled with the filing of 20 grievances over the failure of the respondent to permit employees to bid for the jobs in question. The Board held that the foregoing established "a claim to and application for the transfer-station work." Id at 531 fn. 10. In this case there was no failure to rehire because there was no layoff. As hereinafter discussed, there was no obligation to post the positions because the contract is inapplicable to the new facility. No unit employee applied for work at Helgesen.

Paragraph 12 alleges that the Respondent failed to employ union affiliated employees as alleged in paragraph 7 in order to avoid its obligation to recognize and bargain with the Union. Insofar as I have found that there was no discrimination against any union affiliated employees, none of whom applied for work at Helgesen, I shall recommend that paragraphs 7 and 12 of the complaint be dismissed.

There is no complaint allegation relating to the Respondent's entrepreneurial decision to establish a separate facility for the increased volume of products that it anticipated handling following Woodman's decision to have Certco supply it with health and beauty aids and other general merchandise items. The General Counsel correctly points out that, at the time the 120,000-square foot Helgesen warehouse was obtained, the Verona Road warehouse had over 150,000 of unused space. He does not address President Watzke's testimony that he anticipated that the Company "would use up all the space . . . [to increase] our product line in our existing lines." Nor does he acknowledge that the number of unit employees increased from 126 to 157 between March 2004 and March 2005. It is obvious that this proceeding would involve different issues if new employees had been hired at Verona Road and the Respondent had failed to apply the collective-bargaining agreement to them at that location or if unit employees had been laid off. Neither of

[2] The General Counsel's brief, at fn. 31, states that the May 15 conversation was not alleged as direct dealing. The transcript, at pp. 268–269, reflects that the General Counsel moved to amend subpar. 8(a) of the complaint in that regard, there was no objection, and I allowed the amendment.

those issues is presented. There is no complaint allegation relating to failure to bargain over the decision to begin operations at the new facility.

Paragraph 9 of the complaint alleges that the Respondent, in violation of Section 8(a)(1) and (5) of the Act, has failed and refused to recognize the Union as the collective-bargaining representative of the Helgesen employees, has failed and refused to apply the collective-bargaining agreement to those employees, and has refused to arbitrate a grievance over the opening of that facility as nonunion. The answer admits the foregoing allegations, denies that the Respondent was obligated to recognize the Union or apply the contract, and affirmatively pleads that the grievance was not arbitrable.

The brief of the General Counsel argues that the opening of the Helgesen warehouse and transfer of unit work violated Section 8(a)(1), (3), and (5) of the Act. The only 8(a)(3) violations alleged in the complaint are contained in paragraphs 7 and 12 and, as discussed above, the allegations of paragraph 12 are predicated upon the paragraph 7 allegations. There is no 8(a)(3) allegation relating to the opening of the warehouse or transfer of work.

The allegations regarding the Respondent's failure to recognize the Union and apply the collective-bargaining agreement raise issues that have come before the Board for decades. They involve the competing interest of the collective-bargaining representative to preserve unit work and the Section 7 right of employees to choose or to choose not to be represented by a collective-bargaining representative.

The contract is of little assistance. Although, as argued by the General Counsel and the Charging Party, the preamble states that it applies to "all employees of . . . [Certco] engaged in work covered by this Agreement, all of Madison, Wisconsin," the wording of the preamble has been repeated without change since the initial collective-bargaining agreement of 1962, and until 2004, there was only one facility in Madison. Only drivers and warehousemen are in the unit although the Respondent also employs mechanics in its truck shop. The agreement does not specify the "work" it covers. The Respondent points out that, in the 1970s, Certco operated a produce facility in Rockford, Illinois. Article 14, Subcontracting, was changed in the contract entered into on October 16, 1970. Article 14 provided, as it provides in the current contract, that Certco will not subcontract or transfer work to an outside company "for the purpose of circumventing . . . this Agreement." Immediately following that prohibition is the following statement: "However, it is understood that nothing contained in this Agreement shall prohibit the Employer from opening new facilities [or] . . . transferring operation[s] from one facility to another . . . ." There is no language relating to any protocol, such as the posting of jobs or recognition upon the presentation of evidence of majority status, to be followed concerning the opening of a new facility.

The Union, in filing its grievance on February 27, contended that the new facility should be covered by the collective-bargaining agreement and that unit employees should have been offered the positions. The Respondent denied the grievance and asserted that it was not arbitrable. The position of the Respondent is consistent with Board precedent as stated in *Super Valu Stores*, 283 NLRB 134, 135 (1987), in which the Board quoted with approval the following language in *Marion Power Shovel Co*., 230 NLRB 576, 577–578 (1977):

> The determination of questions of representation, accretion, and appropriate unit do not depend upon contract interpretation but involve the application of statutory policy, standards, and criteria. These are matters for decision of the Board rather than an arbitrator [footnote omitted].

In short, Board precedent supports the Respondent's position that the grievance was not arbitrable and, even if it were, an employer's "refusal to arbitrate one type of grievance is not necessarily an unfair labor practice. Where an employer refuses to arbitrate a very narrow, specifically defined grievance subject matter, the Board has not found a violation of the Act." *GAF Corp*. 265 NLRB 1361, 1364–1365 (1982).

I find, as argued by the Respondent, that this case is governed *Gitano Distribution Center*, 308 NLRB 1172 (1992). Neither the General Counsel nor the Charging Party cites *Gitano* in their briefs which suggests that they consider it inapplicable. Although the factual situation in *Gitano* involved layoffs and failure to transfer employees, the principle announced is clear. In *Gitano*, the Board stated that it had decided "to abandon the 'partial relocation' and 'spinoff" analyses" used in prior cases and that it would begin its analysis of factual situations involving new facilities with its "long-held rebuttable presumption that the unit at the new facility is a separate appropriate unit," and rather than "focusing on the continuity between the 'old' and 'new' units . . . [will] employ "the correct focus, balancing the rights of the new employees against those of transferees to the new location." Id. at 1176. The Board noted that *Gitano* did not raise the issue of applicability of a current contract, stating:

> Because the new facility is presumptively a separate unit, we would view as irrelevant to the analysis the question of whether or to what extent the employees at the new facility are performing work that previously was performed by the unit employees at the old facility.
>
> The issue of whether an existing contract would be applicable to the new facility is not before us in the present case. However, if the new facility is a separate unit, it would appear that the contract would not apply, without an agreement that it would apply. See *Kroger Co*., 219 NLRB 388 (1975). Id. at fn. 21.

It is axiomatic that, in the absence of transferees or a finding of accretion, the Union must demonstrate majority support in order for there to be a bargaining obligation. See *Mine Workers (Arch of West Virginia),* 338 NLRB 406 fn. 3 (2002). Critical to the Board decision in *Kroger Co.,* supra, cited in footnote 21 of the *Gitano* decision, was evidence that "both Unions offered to submit proof that they had card majorities among the employees at the stores in issue." The contract permits the Respondent to open new facilities and does not establish a protocol for recognition or require that the positions at the new facility be posted. Although the absence of any applications from unit employees may arguably be explained by the Respondent's unlawful statements that the new facility would be nonunion,

making such a finding with regard to any employee other than Steve Anderson, who concluded that he could not apply, requires an inference that the statements were the basis for the absence of applications. In order to find that a bargaining obligation existed, I would have to further infer that a sufficient number of employees would have applied and, absent discrimination, been employed so as to establish a bargaining obligation. The Board has long held that "[i]nferences must be founded on substantial evidence upon the record as a whole" and, since an inference is not substantial evidence, "an inference based on an inference" is impermissible. *Steel-Tex Mfg. Corp.*, 206 NLRB 461, 463 (1973); *Diagnostic Center Hospital Corp.*, 228 NLRB 1215, 1216 (1977).

The General Counsel and the Charging Party argue that the record evidence establishes that the Helgesen warehouse is an accretion to the unit at the Verona Road warehouse citing the functional integration between the two facilities and the asserted lack of authority of Warehouse Manger Pechan.

The Board has followed a restrictive policy in finding accretions to existing units because it seeks to insure that the employees' right to determine their own bargaining representative is not foreclosed. We thus will find a valid accretion "only when the additional employees have little or no separate group identity . . . and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted [footnotes omitted]. *Safeway Stores*, 256 NLRB 918 (1981).

It is undisputed that the employees at the two facilities have the same skills. The Helgesen facility is approximately 10 miles distant from the Verona Road facility. The operations of the warehouses are integrated. At both warehouses the centralized computer system dictates what items are to be warehoused in which bins and which items are to be picked and packed for delivery. Helgesen drivers deliver prepacked pallets to be cross-docked at Verona Road for delivery to distant customers and, pursuant to the Respondent's agreement with the Union, items from Verona Road that are to be warehoused at Helgesen are delivered there by Verona Road drivers. The only interaction between the drivers is when they chance upon each other at the Verona Road fuel pump or at the two Woodman's stores in Madison to which the Helgesen drivers directly deliver products. There is no interaction between the warehouse employees. The drivers and warehousemen at Helgesen are separately supervised, and they have a different pay scale and benefit package.

In this case, the similarity of skills of the employees and the integration of the operations mitigate towards finding a community of interest. The absence of a bargaining history is not a factor insofar as there is no history of inclusion or exclusion. The distance between the two facilities, 10 miles, is also neutral. See *Super Valu Stores,* supra at 136.

Board precedent suggests that the two most significant factors in evaluating the propriety of accretion are the degree of employee interchange and day-to-day supervision. In *Super Valu Stores*, the Board, pointed out that it had specifically addressed those two critical factors in *Towne Ford Sales*, 270 NLRB 311, 312 (1984):

> One of these elements is the degree of interchange of employees between the affiliated companies. *Mac Towing*, 262 NLRB 1331 (1982). No weight is assigned to the fact that interchange is feasible when in fact there has been no actual interchange of employees. *Combustion Engineering,* 195 NLRB 909, 912 (1972). Another important element is whether the day-to-day supervision of employees is the same in the group sought to be accreted. *Save-It Discount Foods*, 263 NLRB 689 (1982); *Weatherite Co*., 261 NLRB 667 (1982). This element is particularly significant, since the day-to-day problems and concerns among the employees at one location may not necessarily be shared by employees who are separately supervised at another location. *Renzetti's Market*, 238 NLRB 174, 175 (1978). *Super Valu Stores*, supra at 136.

Warehouse Manage Pechan's testimony that he runs the day-to-day operations of the warehouse, including hiring and firing, is uncontradicted. The General Counsel and the Charging Party note that Pechan has received no formal human relations management training and, by his own admission, relies on "instinct." Pechan is a warehouse manager, not a human resources or personnel manager. Both the General Counsel and the Charging Party argue that Pechan was not credible, pointing out that Human Resources Coordinator Squires testified that Pechan would consult with him regarding proposed disciplinary actions whereas Pechan admitted to such consultation only "very rarely." In view of the uncontradicted testimony of Squires and Vice President Simon regarding Pechan's authority, the foregoing conflict establishes a difference in perception, not authority. As pointed out by the administrative law judge in *Judge & Dolph, Ltd.*, 333 NLRB 175, 187 (2001), "no supervisor or manager, save an owner, exercises unbridled authority. . . . Every one of them possesses authority which to some degree is circumscribed." The General Counsel points that Human Resources Coordinator Squires sent applications that he had on file to Pechan and specifically referred one of the drivers hired there. There is no evidence regarding the action that Pechan took regarding the applications. The Charging Party argues that the Respondent produced no documents corroborating Pechan's testimony that he actually interviewed and hired employees and argues that the foregoing establish doubts regarding the actual authority exercised by Pechan. Doubts do not constitute probative evidence. Insofar as the General Counsel and the Charging Party seek to assert that Pechan exercises no meaningful supervisory authority, it was incumbent upon them to produce that evidence. The complaint alleges and the answer admits that Pechan is a supervisor. Human resources and Vice President Simon confirm that he possess and exercises that authority. There is no evidence that Warehouse Manager Pechan does not have and exercise the authority to which he testified, specifically that he is "in charge," that he hires and fires, and that he runs the day-to-day operations of the warehouse with the assistance of his subordinate Supervisor Tracy Daubenspeck.

The Board, in *Gitano Distribution Center*, requires that analysis of factual situations involving new facilities begin with the "long-held rebuttable presumption that the unit at the new facility is a separate appropriate unit." The burden is upon the party challenging that presumption to establish that the unit is

not appropriate. The employees share the same skills and the operations are integrated. As in *Bowie Hall Trucking*, supra, 290 NLRB 41, payroll, benefits, and records are centrally maintained. Despite the foregoing, Board precedent establishes that in determining the appropriateness of a single location unit, the two most critical factors are separate supervision and absence of interchange. I find that the presumption that the separate Helgesen facility is an appropriate unit has not been rebutted.

The contract permits the Respondent to establish new facilities. It contains no protocol relating to job posting or recognition. There is no complaint allegation that the Respondent violated the Act by failing to bargain with regard to the opening of the new facility. The evidence does not rebut the presumption that the separate Helgesen warehouse constitutes an appropriate unit. This is not to say that a unit encompassing both warehouses would not also be appropriate, but that is not relevant. "[T]he doctrine of accretion will not be applied where the employee group sought to be added to an established bargaining unit is so composed that it may separately constitute an appropriate bargaining unit." *Hershey Foods Corp.*, 208 NLRB 452, 458 (1974). "To hold that the new warehouse is an accretion to the unit represented by the Union would be to contravene the policies expressed in . . . [Board precedent], and would effectively deprive the employees of the right to determine the issue of representation." *Essex Wire Corp.*, 130 NLRB 450, 453 (1961). In view of the foregoing, I shall recommend that the allegations contained in paragraph 9 of the complaint be dismissed.[3]

4. The information request

The Respondent argues that it "had no duty to supply information concerning the nonunion Helgesen facility" and that the Union did not meet its burden of showing that the requested information was relevant. In view of the absence of a bargaining obligation with regard to the Helgesen facility, I agree with the Respondent that information sought relating to the establishment of that facility, the management of that facility, and information regarding employees at the facility is not relevant.

Contrary to the Respondent's argument, I find that the portions of the Union's request for information regarding unit work, product that was previously warehoused at Verona Road and that was being moved to Helgesen, was relevant and that the Union established its need for that information. The Union pointed out that the information sought regarding "your transfer of work" was "to prepare for effects bargaining." Information relating to the performance of unit work by nonunit employees is relevant. *Phoenix Coca-Cola Bottling Co*., 337 NLRB 1239 (2002). I find that the requests in paragraphs 3 and 4 for a description of "the type of groceries and other product warehoused " in the "Old Location " and the "New Location" respectively directly relate to unit work in view of the testimony regarding movement of product from the packroom and the movement of nuts and seasonal candy. The request in paragraph 35 regarding whether any work has been transferred is answered by the testimony herein; work has been transferred. The record does not identify who made the decision to transfer what work. The identity of the decision maker is potentially relevant to effects bargaining. Similarly, the information sought in paragraph 38 relating to any "plan to transfer any other work" is clearly relevant. Paragraph 41 requests identification of the work that the Respondent initially planned to transfer. On February 23, Vice President Simon informed employees that not all of the work in the packroom would be transferred. The requested information, with the information sought in paragraphs 3 and 4, is relevant in that it would reveal whether that plan had changed. I find that the Union's request established the relevance of, and its need for, the foregoing information in order to prepare for effects bargaining and that the Respondent, having not responded to the request in any way, violated Section 8(a)(5) of the Act by failing and refusing to provide the foregoing information.

CONCLUSIONS OF LAW

1. By informing its union affiliated unit employees prior to hiring the work force at the Helgesen warehouse that union affiliation was incompatible with employment at that location because the facility would be nonunion, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By promising employees an increase in their wages and improved benefits if they participated in the Certco 401(k) plan rather than the Teamsters Central States Pension Fund, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. By bypassing the Union and dealing directly with employees by promising them an increase in their wages and improved benefits if they participated in the Certco 401(k) plan rather than the Teamsters Central States Pension Fund, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

4. By failing and refusing to provide the Union with the information it requested regarding product that was previously warehoused at Verona Road and that was being moved to Helgesen Drive, said information being relevant and necessary to the Union as the collective-bargaining representative of the unit employees it represents, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and post an appropriate notice.

[3] The foregoing finding establishes that the appropriate unit is:

All warehousemen and drivers employed by the employer at its Verona Road warehouse, Madison, Wisconsin; but excluding all other employees, guards, and supervisors as defined in the Act.

The Respondent having failed and refused to provide the Union with information it requested on May 10, 2004, as specified above, it must provide that information.

[Recommended Order omitted from publication.]